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FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 5926

DATE COMPLAINT FILED: July 16, 2007

DATE OF NOTIFICATION: July 20, 2007

LAST RESPONSE RECEIVED: August 16, 2007

DATE ACTIVATED: September 17, 2007

STATUTE OF LIMITATIONS: March 3, 2008

SOURCE:

Citizens for Responsibility and Ethics in
Washington (CREW)
Melanie Sloan
Diane Gerth

RESPONDENTS:

Republican Party of Minnesota
Anthony G. Sutton, in his official capacity as
treasurer
Marina Taubenberger

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 434(b)
2 U.S.C. § 438(b)
11 C.F.R. § 100.74
11 C.F.R. § 100.79
11 C.F.R. § 104.3(d)
11 C.F.R. § 104.11
11 C.F.R. § 116.5
11 C.F.R. § 116.7(f)

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

This matter originated with a complaint filed by Citizens for Responsibility and Ethics in Washington ("CREW"), Melanie Sloan (CREW's executive director), and Diane Gerth (a registered voter and resident of Minnesota). The Complainants allege that the Republican Party of Minnesota ("RPM") violated several sections of the Federal Election Campaign Act ("the

1 Act”), based on information contained in a press article in the *Minneapolis-St. Paul Star Tribune*
2 and a confidential memorandum written by former RPM finance director Dwight Tostenson and
3 published in the *Star Tribune*. Complaint at 3. The article reported that Tostenson drafted a
4 memorandum to the RPM State Executive Committee on February 15, 2007 alleging that RPM
5 understated its debts by \$100,000 or more, and significantly delayed payment of staff expense
6 reports. Dan Browning and Pat Doyle, Internal Complaints Roil State GOP Office, Minneapolis-
7 St. Paul Star Tribune (June 2, 2007). The memorandum stated that beginning in May 2006,
8 Tostenson reported to the Chairman of RPM that the committee was violating FEC laws and
9 provided the committee Chairman with a list of suspected illegal activities. Complaint at 4.
10 From February 20-26, 2007, only days after Tostenson reportedly gave his memorandum to the
11 RPM Executive Board, RPM filed amendments to 51 monthly reports that it had originally filed
12 from 2002 through 2006.

13 The complaint makes three allegations. Complainant alleges that RPM violated 2 U.S.C.
14 § 434(b)(8) and 11 C.F.R. §§ 104.3(d), 104.11(a) and (b) by failing to disclose debts and
15 obligations of \$100,000 or more from approximately May 2006 to at least February 2007.
16 Complaint at 5. Complainant further alleges that RPM violated 11 C.F.R. § 116.5 by failing to
17 report unreimbursed staff advances as contributions and outstanding debts during the same
18 approximate time period. Complaint at 6. Finally, the complaint alleges that RPM does not
19 meet the threshold requirements for substantial compliance with the Act and thus should be
20 subject to a Commission audit and field investigation under 2 U.S.C. § 438(b).

21 RPM's response to the complaint does not address the merits of the allegations. Instead,
22 Respondents request that the Commission take no action with respect to the matter at this time.
23 The response explains that RPM is currently reviewing its own records for the period of time at

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1 issue and has retained an outside accounting firm to assist in the process. The response also
2 states that RPM intends to file all amendments to its disclosure reports simultaneously by an
3 anticipated date of December 2007. Due to RPM's "comprehensive action on its own accord and
4 in good faith," Respondents request that the matter be held in abeyance until the review and
5 amendment process is completed. In this Office's initial contact with counsel for the
6 Respondents, counsel indicated that Respondents were holding status meetings regarding the
7 internal audit and that they had completed review of two years of the committee's activity.
8 Counsel indicated that the results of the audit would not likely be available until the end of 2007
9 at the earliest. In this Office's later contact with Respondents, they indicated that they are
10 uncertain as to when they will be able to submit additional information. Respondents have yet to
11 file any amendments to its disclosure reports or provide us with any additional information about
12 its findings.

13 II. ANALYSIS

14 Based on the allegations set forth in the complaint and our research of the public record,
15 we recommend that the Commission find reason to believe that respondents Republican Party of
16 Minnesota and Anthony G. Sutton, in his official capacity as treasurer, violated 2 U.S.C.
17 § 434(b) and request that the Commission authorize an investigation, including the use of
18 compulsory process.

19 A. Employee Retirement Accounts

20 Tostenson's confidential memorandum alleged that RPM misappropriated employees'
21 retirement account funds. He claimed the funds were withheld from employee payroll checks
22 but not immediately deposited into employee accounts. Exhibit B at 1. Tostenson alleged that as

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1 much as \$12,000 was not deposited at any one time and that some delays in payment exceeded
2 five months. Exhibit B at 2.

3 A 2003 Commission Advisory Opinion advised that amounts of money spent on fringe
4 benefits, such as insurance and retirement plans, is considered compensated time, and thus falls
5 under the rules for payment of salary and wages (Advisory Opinion 2003-11, *Michigan*
6 *Democratic State Central Committee*). In the instant matter, Respondent's failure to pay
7 employees' retirement benefits as specified in their employment contracts appears to constitute a
8 violation of the Act in light of Advisory Opinion 2003-11. 11 C.F.R. § 104.11(b) provides that
9 regularly recurring administrative expenses will be treated as debt when payment is due. If a
10 committee does not pay an employee for services rendered to the committee in accordance with
11 an employment contract or a formal or informal agreement to do so, the unpaid amount may be
12 treated as debt owed by the committee to the employee, or the employee can sign a written
13 agreement to convert his or her status to a volunteer. 11 C.F.R. § 100.74. If the unpaid amount
14 is treated as debt, the committee must continue to report the debt in accordance with 11 C.F.R.
15 §§ 104.3(d) and 104.11 until the debt is extinguished, until the Commission has completed a
16 review of a debt settlement plan pursuant to 11 C.F.R. § 116.7(f), or until the employee agrees to
17 become a volunteer, whichever occurs first. Thus, failure to report the unpaid benefits as debt
18 without either a debt settlement plan or volunteer services agreement is a violation of 2 U.S.C.
19 § 434(b).

20 RPM's disclosure reports appear to substantiate Tostenson's allegation of delayed
21 payments to employee retirement accounts. The committee's reports display a pattern of failing
22 to make payments into employee retirement accounts for several months, followed by a large
23 "catch up" disbursement. For example, from October 2005 through June 2006, RPM had zero

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1 disbursements reported to employee retirement accounts. In July 2006, RPM reported a
2 \$12,243.46 payment to the IRA accounts. In 2006, the monthly figure normally paid to
3 employee IRA accounts was \$1,659.56. RPM had other periods of non-payment to the IRA
4 accounts, including several months in 2007. This pattern suggests that RPM violated 2 U.S.C.
5 § 434(b) by failing to report unpaid employee retirement benefits as debt. Therefore, we
6 recommend that the Commission find reason to believe that RPM violated 2 U.S.C. § 434(b).

7 **B. Failure to Report Debts and Delayed Payment of Staff Expense Reports**

8 As noted in the introduction, Complainant also alleges a possible § 434(b)(8) reporting
9 violation due to RPM's failure to report debts and obligations of \$100,000 or more. 2 U.S.C.
10 § 434(b)(8) requires committees to disclose "the nature and amount of outstanding debts and
11 obligations" in their reports. These debts and obligations must be continuously reported until
12 they are extinguished. 11 C.F.R. § 104.11(a). Debts of \$500 or less must be reported no later
13 than 60 days after the obligation is incurred, while debts of more than \$500 must be reported as
14 of the date the obligation is incurred. 11 C.F.R. § 104.11(b).

15 In addition, Complainant alleges a possible reporting violation if RPM significantly
16 delayed payment of staff expense reports. The payment by an individual from his or her
17 personal funds, including a personal credit card, for the costs incurred by or on behalf of, a
18 candidate or political committee is a contribution unless the payment is exempted from the
19 definition of contribution under 11 C.F.R. § 100.79. 11 C.F.R. § 116.5. Specifically, if the
20 payment is not exempted under 11 C.F.R. § 100.79, it shall be considered a contribution by the
21 individual unless the individual is reimbursed within sixty days after the closing date of the
22 billing statement on which the charges first appear if the payment was made using a personal
23 credit card, or within thirty days after the expense was incurred if a personal credit card was not

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1 used. 11 C.F.R. § 116.5(b)(2). A committee must treat the obligation arising from payment
2 described above as an outstanding debt until reimbursed (*see* 11 C.F.R. § 116.5(c)), and is
3 therefore subject to the reporting requirements of 2 U.S.C. § 434(b).

4 RPM's original disclosure reports filed with the Commission for May 2006 through
5 February 2007, the time period of the alleged violations, show that RPM disclosed only one debt,
6 a loan from Alliance Bank that ranged in value from approximately \$130,000 to \$170,000. RPM
7 disclosed no additional debts in the 51 amended reports it filed in February 2007. Therefore, if
8 RPM incurred debt in excess of \$170,000 or delayed repayment of expenses incurred by its staff
9 beyond the timeframes allowed by the regulations, it violated 2 U.S.C. § 434(b)(8) by failing to
10 report its debts and obligations.¹

11 Notably, RPM did not deny any of the complaint's allegations in its response or to the
12 press. However, a follow-up article in the *Minneapolis-St. Paul Star Tribune* reported that State
13 GOP spokesman Mark Drake said that the party is confident that it is taking all necessary steps
14 to comply with FEC regulations and claimed the complaint by CREW was "politically
15 motivated." Dan Browning, Complaint Filed Over State GOP Finances, *Minneapolis-St. Paul*
16 *Star Tribune* (July 17, 2007). So, while the party stated to the press that it is taking steps to
17 comply with Commission regulations, it has not denied the allegations. In fact, a search of the
18 public record has also not revealed any statements from RPM intended to discredit Tostenson.²
19 Tostenson, who has alleged reporting violations, would be in a good position to know about
20 these violations, as he was acting as finance director of the committee during the period in
21 question. In fact, RPM's response to the complaint indicates that it is conducting an internal

¹ Although a review of the 51 amendments revealed several irregularities, including shifting the reporting of employee reimbursements from the Schedule H4 (Disbursements for Allocated Federal/Nonfederal Activity) to Schedule B (Itemized Disbursements), the face of the reports do not provide the information necessary to draw any conclusion as to whether RPM failed to disclose its debts and obligations in accordance with the Act.

² Tostenson alleges that he was fired from his position at RPM on February 9, 2007.

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1 audit and expects to file further amendments to its disclosure reports.³ The Committee likely
2 would not invest resources to conduct a comprehensive internal audit without any indication of
3 the truthfulness of Tostenson's allegations. Consequently, we recommend that the Commission
4 find reason to believe that RPM violated 2 U.S.C. § 434(b) and authorize an investigation.

5 **C. Former Treasurer**

6 Marina Taubenberger, RPM's former treasurer, is also a named Respondent in the
7 complaint. She served as the Committee treasurer until March 2007, at which time Anthony
8 Sutton became treasurer. In accordance with the Commission's policy on treasurers, only the
9 current treasurer of a political committee will be named in his or her official capacity, unless
10 information indicates that a treasurer has knowingly and willfully violated a provision of the Act
11 or regulations, or has recklessly failed to fulfill duties specifically imposed on treasurers by the
12 Act, or has intentionally deprived himself or herself of the operative facts giving rise to the
13 violation. *See* Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings,
14 January 3, 2005. In that case, a past or present treasurer may be named in his or her personal
15 capacity. Without sufficient information about Taubenberger's actions to make such a
16 recommendation, we recommend that the Commission take no action at this time with respect to
17 this respondent. If investigation of RPM provides information that warrants Taubenberger being
18 named in her personal capacity, we will make that recommendation to the Commission.

19 **III. INVESTIGATION**

20 If RPM provides additional information from its internal audit or amends its disclosure
21 reports, we will consider any relevant information. We plan to conduct an initial informal

³ Although Respondent could have audited and reviewed these claims in February when Tostenson's memorandum alleging reporting violations was received, RPM did not begin its own audit until after the complaint was sent to the Committee. In addition, we provided RPM with additional time to provide us with the result of its internal audit and file amendments to its reports, but it failed to do so within the timeframe specified.

investigation to gather more information about Tostenson's allegations.

IV. RECOMMENDATIONS

1. Find reason to believe that the Republican Party of Minnesota and Anthony G. Sutton, in his official capacity as treasurer, violated 2 U.S.C. § 434(b);
2. Take no action at this time with respect to Marina Taubenberger;
3. Approve the attached Factual and Legal Analysis;
4. Authorize the use of compulsory process; and
5. Approve the appropriate letters.

Date

1-16-08

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